

Government of the District of Columbia
ZONING COMMISSION



ZONING COMMISSION ORDER NO. 867
Case No. 98-6/95-8
(Text Amendment - Tolling of PUD Time Periods)
January 11, 1999

This case is the application of The Archdiocese of Washington (D.C.) for an amendment to the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning, to toll the time periods for proceeding under an approved planned unit development (PUD) when the Zoning Commission's decision approving the PUD is on appeal. The applicant is the owner of property in the 1700 block of Rhode Island Avenue, N.W., for which a PUD was approved and which is the subject of pending litigation. This text amendment applies to that PUD as well as to any other PUD similarly situated.

The application (Case No. 95-8) was originally initiated on May 25, 1995, at which time the applicant requested the Zoning Commission to act on an emergency basis to amend the Zoning Regulations to toll the PUD time limits during litigation. The Commission held a public hearing and adopted amendments to 11 DCMR setting up the standards for determining "good cause" to judge PUD extension requests (see Zoning Commission Order No. 810, effective February 14, 1997) but did not rule upon the request for emergency action on the subject tolling text amendment.

On March 6, 1998, the applicant renewed the request for emergency action. At its public meeting held on June 8, 1998, the Commission found insufficient circumstances to warrant action on an emergency basis but did schedule a public hearing on the proposed text amendment. Proper notice was given and a public hearing was held on September 17, 1998.

The Zoning Regulations provide that, once a PUD is approved, an applicant must file an application for a building permit within two years and begin construction on the project within three years (11 DCMR §§2408.8 and 2408.9). Those periods may be extended upon request, but under the current regulations, the time periods are not tolled while litigation challenging the Commission's approval is pending.

Approval of a PUD is the only action of the Commission that carries a time limit within which an approved development must be commenced. Zoning Map amendments and amendments to the text of the Zoning Regulations do not have an expiration date. To this extent, approval of a PUD is similar to approval of an application by the Board of Zoning Adjustment (BZA). The Commission has adopted a provision in the Zoning Regulations (11 DCMR §3104.5) tolling the time limits on BZA orders while an appeal is pending.

At the public hearing in this case, the Commission heard testimony from representatives of the applicant, including experts in administrative law, financing and zoning and land use, as well as one other individual in support of the proposed amendment. The Commission also received letters in support of the proposed amendment from the D.C. Chamber of Commerce, the D.C. Building Industry Association, commercial brokers, a mortgage banker, an appraiser, and the Director of the Baltimore Development Corporation. The Office of Planning (OP), by report dated September 8, 1998, and by testimony at the public hearing, also supported the proposed amendment.

Several letters in the record voice opposition to action on an emergency basis and raise issues generally against adoption of the proposed amendments. No additional comments were submitted to the Commission after the matter was set for public hearing and no person appeared at the public hearing in opposition to the application.

There were no reports received from any Advisory Neighborhood Commission.

Based on all of the testimony, reports and information in the record, the Commission believes that adoption of the proposed text amendment is appropriate for the following reasons:

1. The filing of an appeal places a sufficient cloud over the Commission's approval of a PUD in that the ability of an applicant to proceed is severely compromised. The Commission heard from lenders, appraisers, bankers, title companies and others in that normal development activities could not proceed so long as the approval which is the basic underpinning of the development was subject to challenge.
2. Challenges to approvals of PUDs are by petition for review in the D.C. Court of Appeals. The length of time it takes for an appeal to be decided by the Court varies, but it often can take two years or more. It is therefore unlikely that an applicant will be able to proceed within the timeframe specified in the Zoning Regulations.
3. In the absence of a tolling provision, an applicant would be required to seek an extension of the PUD approval from the Commission. The order granting the extension itself is appealable, setting up the potential for an unending cycle of appeals and extensions. The PUD approved for 1717 Rhode Island Avenue (the case of interest to the Archdiocese) is one example of a case subject to the appeal/extension loop. The adoption of the text will enable this PUD to move forward.
4. Tolling the normal time limits imparts the certainty necessary for an applicant to be able to proceed with a project. The finality of a decision is locked-in once the Court rules, and an applicant would have a clear two year window to accomplish all the pre-development activities necessary to submit the application for a permit and actually begin construction.

5. Tolling also improves the efficiency of the zoning process and the use of the Commission's time, since applicants would not need to seek extensions of PUD approvals solely because of delays occasioned by litigation.
6. Tolling is equitable relief that is fundamentally fair to an applicant. A successful applicant should not be prevented from going forward because an appeal erodes the time in which an applicant must act. The Commission notes that tolling is applicable only if the Court upholds the Commission's approval, while tolling is of no consequence if the Court overturns the approval.

A notice of proposed rulemaking was published in the D.C. Register on November 20, 1998. No comments were received in response to the notice.

The Zoning Commission believes that its decision to approve the text amendment set forth herein is in the best interests of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act.

The proposed decision to approve the text amendment was referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. The NCPC, by report dated November 5, 1998, found that the proposed amendment would not affect the federal establishment or other federal interests nor be inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission for the District of Columbia hereby orders approval of the following amendments to the Zoning Regulations:

1. Add a new Section 2408.13 to read as follows:

In the event an appeal is filed in a court of competent jurisdiction from an order of the Commission, the time limitations of Sections 2408.8 and 2408.9 shall run from the decision date of the court's final determination of the appeal. Unless stayed by the Commission or a court of competent jurisdiction, an applicant may proceed pursuant to the order of the Commission prior to any such final determination.

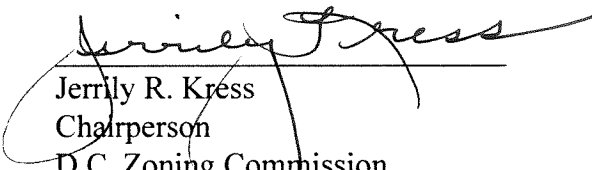
2. Existing sections 2408.13 and 2408.14 are accordingly redesignated as sections 2408.14 and 2408.15.


Vote of the Commission taken at the public hearing held on September 17, 1998: 5-0 (Herbert M. Franklin, John G. Parsons, Angel F. Clarens, Anthony J. Hood and Jerrily R. Kress, to approve).

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This order was adopted by the Zoning Commission at its public meeting held on January 11, 1999, by a vote of 5-0 (John G. Parsons, Anthony J. Hood, Herbert M. Franklin, Jerrily R. Kress and Angel F. Clarens, to adopt.

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is on FEB 5 1999.


Jerrily R. Kress
Chairperson
D.C. Zoning Commission


Sheri M. Pruitt-Williams
Interim Director
Office of Zoning